King Soopers, Inc. *and* Jenny Tilton *and* Lucinda Casados *and* United Food and Commercial Workers, Local No. 7 *and* Bakery, Confectionery, Tobacco Workers and Grain Millers International Union Local #26, AFL–CIO. Cases 27–CA–14882, 27–CA–14883, 27–CA–15420, 27–CA–15444, 27–CA–15474, 27–CA–15610, 27–CA–15641, 27–CA–16023, and 27–CA–16177–1

September 13, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On January 14, 2000, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions[1] and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, King Soopers, Inc., Lakewood, Greely, and Bellevue, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

"(b) Within 14 days of service by the Region, post at its Colorado facilities where violations have been found, copies of the attached notice marked 'Appendix.'[3] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be take by the Respondent to ensure the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current and former employees employed by the Respondent at any time since June 23, 1997."

Barbara E. Greene and *Angie Harmeyer*, *Esqs.,* for the General Counsel.

Raymond M. Deeny, Emily F. Keimig, and *Ted C. Tow III (Sherman & Howard),* of Colorado Springs and Denver, Colorado, for the Respondent.

Michael J. Belo, of Wheat Ridge, Colorado, for United Food and Commercial Workers Union, Local 7.

Walter C. Brauer III (Brauer, Buescher, Valentine, Goldhammer, Kelmer & Eckert), of Denver, Colorado, for Bakery Workers Local 26.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Denver, Colorado, on various dates beginning on April 8, 1999, and ending on August 3, 1999. On September 27, 1996, Jenny Tilton (Tilton) filed the charge in Case 27–CA–14882 alleging that King Soopers, Inc. (Respondent or the Employer) committed certain violations of Section 8(a) (1) and (3) of the National Labor Relations Act (the Act). Tilton filed the first amended charge on January 28, 1999. On September 29, 1996, Lucinda Casados (Casados) filed the charge in Case 27–CA–14883 against Respondent. Casados filed the first amended charge on January 22, 1999. On August 8, 1996, United Food and Commercial Workers Union, Local No. 7 (UFCW Local 7) filed the charge in Case 27–CA–14763 against Respondent. An amended charge was filed in that case on January 20, 1999. UFCW filed the charge in Case 27–CA–15420 on July 28, 1997. UFCW filed the charge in Case 27–CA–15420 on July 28, 1997. The charge in Case 27–CA–15474 was filed by UFCW Local 7 on August 29, 1997. On March 24, 1998, UFCW Local 7 filed the charge in Case 27–CA–15610. The charge in Case 27–CA–15641 was filed by UFCW Local 7 on December 29, 1997. On December 16,

[1] The Respondent has requested oral argument. The request is denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge's finding that Bakery Workers Local 26 is a labor organization. No merit has been found in the Respondent's exception to the same finding in *King Soopers, Inc.*, 332 NLRB 29 (2000). In that proceeding, we adopted the judge's finding that the affiliation of each of the locals of the Bakery Workers International Union, including Bakery Workers Local 26, with the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union did not raise a question concerning representation of employees represented by Local 26. Accordingly, we find no merit in the Respondent's parallel exception in this proceeding.

Member Hurtgen finds it unnecessary to pass on whether store 4 Manager Linda Pickett's directive to employee Pam Peek to clear materials with the store manager or human relations department before posting them on the union bulletin board independently violated Sec. 8(a)(1). Member Hurtgen notes that this incident is not separately alleged to be a violation, and, in any event, would be cumulative and would not affect the Order or notice.

[3] We have modified the recommended Order to comport with the requirements of *Excel Container, Inc.*, 325 NLRB 17 (1997).

1998, UFCW Local 7 filed the charge in Case 27–CA–16177–1. On August 27, 1998, Case 27–CA–16023 was filed by Bakery, Confectionery, Tobacco Workers and Grain Millers International Union Local #26 (Bakery Workers Local 26). The Regional Director for Region 27 of the National Labor Relations Board issued six consolidated complaints and notices of hearing against Respondent alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act. Respondent filed timely answers to the complaints, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with various offices and facilities, in the State of Colorado, where it has been engaged in the retail sale of groceries and related items. Respondent annually derives gross revenues in excess of $500, 000 and purchases and receives goods and materials valued in excess of $5000 from outside the State of Colorado. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the UFCW Local 7 is a labor organization within the meaning of Section 2(5) of the Act.

Based on a merger of the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union with the Grain Millers International Union, Respondent denied the labor organization status of the Bakery Workers Local # 26. In *King Soopers, Inc.,* 332 NLRB No. 5 (2000), I found that the merger of the two International Unions did not raise a question concerning representation. I again find that Bakery Workers Local # 26 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Respondent operates over 80 retail grocery stores in the State of Colorado. In many of these facilities, the grocery clerks are represented by UFCW Local 7 and the bakery department employees are represented by Bakery Workers Local # 26. In addition to representing store clerks, UFCW Local 7 represents meat department employees in bargaining units separate and apart from the grocery clerks units. Respondent operates a meat plant at which the employees are represented by UFCW, Local 7. The Bakery Workers Local 26 represents employees of the bakery department at stores in the Denver metropolitan area and at other stores in Colorado. In addition Bakery Workers Local # 26 represents bakery employees at Respondent's bakery plant.

1. From May 13, to June 24, 1996, employees represented by UFCW Local 7 engaged in a strike against Respondent. Casados and Tilton, both employed at Respondent's meat plant, participated in the strike. They both picketed at the meat plant and at a grocery store. In this case, the General Counsel alleges that Respondent threatened and disciplined Tilton and Casados because they engaged in the strike and/or other protected concerted activities.

2. Willard Foster is an all-purpose clerk at Respondent's store 60 in Lakewood, Colorado. In this case, the General Counsel alleges that Respondent through Donna Riggin, Foster's store manager, intimated, coerced, and threatened Foster because he performed duties as a shop steward.

3. Employee Pam Peek worked as a service desk clerk at store 22. Peek sent a letter to Respondent's president in 1996 concerning a work-related problem. The General Counsel contends that Store Manager Donna Riggin unlawfully interrogated Peek about this letter.

4. UFCW Local 7 represents only the meat department employees at Respondent's store 32 in Greely, Colorado. In March 1997, in connection with the grievance of a meat department employee, Union Representative Kevin Schneider requested attendance records for employees employed at that store. Respondent permitted Schneider access to the records for union-represented employees but denied him the information for employees outside the bargaining unit. The General Counsel argues that since June 1998, Respondent has unlawfully failed and refused to provide relevant information to UFCW Local 7 in violation of Section 8(a)(5).

5. The General Counsel alleges that Respondent maintained an overly broad solicitation rule and restriction on posting information on the union bulletin board. Respondent argues that its rule was consistent with its collective-bargaining agreement with UFCW Local 7.

6. The General Counsel alleges that Respondent unlawfully promulgated and maintained a rule restricting internal union campaigning at its grocery stores. Respondent contends that its rule was consistent with past practice and agreed to by the president of UFCW Local 7.

7. The General Counsel alleges that Respondent unlawfully caused a citation to be issued to Union Representative James Hobson for engaging in union activities at store 35.

8. Bakery Workers Local 26 represents Respondent's workers at the Employer's bakery plant and at various bakery departments in Respondent's retail grocery stores. In June 1998, Bakery Workers sought information concerning a grievance over the backpay due certain employees. In this grievance, Bakery Workers sought backpay for bargaining unit employees who allegedly lost wages because supervisors had performed bargaining unit work. Respondent agreed to permit the employees to work the extra hours. The Union on the other hand, sought backpay for the employees without the hours having to be worked. In support of its position the Bakery Workers sought Respondent's bargaining notes regarding the "remedies for errors" provision of the collective-bargaining agreement.

[1] The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Respondent refused to furnish the notes. The General Counsel alleges that Respondent violated Section 8(a)(5) of the Act by failing and refusing to furnish copies of the Employer's bargaining notes.

The allegations concerning Lucinda Casados and Jenny Tilton

The Facts

As stated earlier, Casados and Tilton engaged in UFCW Local 7's strike against Respondent from May 13 to June 24, 1996. These two employees picketed at the meat plant where they work and also at one of Respondent's supermarkets. The strike ended on the signing of a strike settlement agreement.

The strike settlement agreement provided for the reinstatement of employees who had been terminated during the strike for misconduct. In exchange, Respondent received provisions that would secure an orderly return to work. The purpose was to prevent harassment of employees and to avoid work disruptions that had occurred after previous strikes. The strike settlement agreement established a special grievance and arbitration procedure, separate and apart from the procedures under the collective-bargaining agreement, for the resolution of disputes under the settlement agreement.

Following the execution of the settlement agreement, Respondent issued a work rule setting forth the antiharassment restrictions that been agreed by the parties. Upon their return to work, employees were asked to sign and date a copy of these rules. Those employees who refused to sign, including Casados and Tilton, were advised that they were nevertheless obligated to follow the rules.

Over the following weeks, over a half dozen employees were disciplined for violating the strike agreement, including making inappropriate comments between employees. At one store, 16 employees were discharged for violating the agreement. UFCW Local 7 challenged these terminations and the dispute was submitted to arbitration under the special procedure set forth in the strike settlement agreement. The arbitrator reduced the terminations to 2-week suspensions.

On September 5, 1996, Supervisor Larry McGinty escorted Casados and Tilton to the office of Jerry Martinez, production supervisor. Martinez directed Casados and Tilton to reread the rules regarding the orderly return to work. Martinez then told Casados and Tilton that they were accused of calling another employee a scab. He told the employees that under the rules they could not harass employees or call them scabs. Martinez informed the two employees that if they again used the word scab, they would be disciplined. While Martinez did not formally issue a warning to the employees, copies of his notes of this conversation were ultimately placed in the files of the two employees.

The evidence establishes that this was not a disciplinary interview. The employees were informed that this was not a disciplinary meeting. Rather, Martinez reminded the employees of the rule against harassment because he had been told that they had harassed a fellow employee.

On September 21, Casados and Tilton were each summoned to Martinez' office. First, Casados went to Martinez' office. In the presence of Union Steward Dave Thompson, Martinez told Casados that she was accused of calling employee Joan Joiner a scab and that Joiner had quit her job because of the incident. Casados denied calling anyone a scab. Martinez said he had two witnesses. Martinez gave Casados a written warning stating, "Cindy has been warned that this type of behavior would not be tolerated and that if the issue came up again that disciplinary action would be taken." After, Casados left the office, Tilton was brought in to speak with Martinez. With the union steward present, Martinez told Tilton that she and Casados had been accused of causing Joiner to quit her job by calling Joiner a scab. Tilton denied even knowing Joiner. Martinez then informed Tilton that he was giving her a written warning because she had previously been warned about using the word scab.

The September 21 meetings were disciplinary interviews and Martinez secured the presence of a union steward to assist the two employees. Martinez had two witnesses, one of which was a leadman, tell him that Joiner had quit because of statements by Tilton and Casados. Martinez did not believe stronger discipline was necessary.

There were no further incidents involving Casados or Tilton until July 1997. On July 8, 1997, Martinez issued Casados a 5-day final warning suspension. The written notice states that Casados had mistreated and cursed a fellow employee. The notice made reference to the fact that Casados had received prior warnings concerning misconduct in the workplace. The July 8 warning was based on an incident in which Casados had told another employee, "to get her own fucking trays." Casados testified that the other employee had been hollering for trays and had grabbed Casados' leg.

Martinez received this information from the employee whom Casados had cursed. Casados admitted to Martinez that she had cursed the employee. Casados had been disciplined twice before for harassing fellow employees and for using profane language toward a fellow employee. Based on these prior warnings, Martinez issued Casados a warning and suspension.

Preliminary Conclusions

The General Counsel contends that the use of the word scab is protected under Section 7 of the Act. That argument is fundamentally incorrect. It is well established that in the context of a labor dispute, the use of the word scab is not so egregious as to forfeit the protections of Section 7 of the Act. *Teledyne Still-Man,* 295 NLRB 161, 171 (1989), enfd. 911 F.2d 1214 (6th Cir. 1990). However, the word scab does not enjoy any special privilege under the Act. Further, there is nothing in the Act which bars a union and an employer from bargaining collectively a strike settlement agreement which prohibits employees from insults and epithets, including the word scab.

The General Counsel contends that the use of the term "scab" is protected by Section 7 of the Act. In support of this argument the General Counsel cites the following excerpt from *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 58 (1966):

> Labor disputes are ordinarily heated affairs: the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation elections are frequently characterized by bitter and extreme charges, counter-charges, unfounded rumors,

> vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.

The Supreme Court went on to state at 383 U.S. at 60–61:

> We note that the Board has given frequent consideration to the type of statements circulated during labor controversies, and that it has allowed wide latitude to the competing parties . . . . Likewise, in a number of cases, the Board has concluded that such epithets such as "scab," "unfair," and "liar" are commonplace in these struggles and are not so indefensible as to remove them from the protection of Section 7, even though the statements are erroneous and defame one of the parties to the dispute.

The cases cited by the General Counsel do not establish that an employee calling another employee a scab is engaged in activity protected by the Act. Rather, these cases hold that an employee engaged in Section 7 activity, such as organizing or striking, does not lose the protection of the Act by using the word "scab" or other language which might be offensive in another context. The cases protecting the wearing of union insignia do not establish a right of an employee to call another employee a "scab" or any other name. Rather, these cases establish the right of employees to wear union insignia at work absent special circumstances that outweigh the employees Section 7 rights. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). They do not establish the right of employees to confront fellow employees at work.

In *Canandaigua Plastics,* 285 NLRB 278 (1987), the Board held that the employer who had discharged a union adherent for harassing a fellow employee did not violate the Act. In *Canandaigua Plastics,* the alleged discriminatee had called a fellow employee names. The employee had been warned that if she did not stop the harassment, she would be disciplined. The Board held that the discharge for such harassment was lawful.

The issue remains whether Respondent disciplined Casados and Tilton because those employees engaged in the strike. In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). In *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

In the instant case, Tilton and Casados engaged in union and protected activity during the strike. Numerous other employees engaged in these same activities. The September 5 incident alleged to be violative was not a warning. Rather, the credible evidence shows that upon hearing that the employees had harassed another employee, Martinez reminded Casados and Tilton about the rules against such harassment. Union activities were not a factor in his conduct.

On September 21, Casados and Tilton were issued written warnings by Martinez. Martinez based the discipline on evidence provided by two witnesses, one of which was a leadman. Based on this information and the previous conversation with Casados and Tilton on September 5, Martinez warned both employees. I cannot find that union activity or protected conduct was a motivating factor in Martinez' decision.

In July 1997, a year after the strike ended, Martinez issued Casados a warning and suspension. Casados admitted to cursing the fellow employee. She had three warnings in her file for harassing or cursing fellow employees. Again, I find that Martinez' discipline of Casados was not based on union activity.

B. The Alleged Coercion of Willard Foster

The Facts

Willard Foster is an all-purpose clerk and a shop steward at Respondent's store 60 in Lakewood. Foster testified that on November 11, 1997, Foster, while on an assigned 10-minute break, approached Donna Riggin, store manager, to request an appointment to discuss union business. Riggin said she was too busy to talk to Foster but Foster said they would have to have a discussion that day concerning an employee's pay. Riggin then stated they could discuss the matter on Foster's breaktime. Foster described the employee's pay issue and requested relief for the employee. Riggin denied the request. Foster then presented Riggin with a form he had previously filled out showing that Riggin and Foster had just unsuccessfully completed step one of the grievance procedure. Riggin became upset and yelled an insult at Foster. Riggin called the assistant manager to take her place and told Foster to meet her at the upstairs office. In the office, Riggin yelled at Foster and called him stupid. Foster said he was there to discuss a grievance. Riggin told Foster that she had "never had such an insolent employee" and stated, "I won't have anybody like you working for me in this store or in King Soopers." She added, "[Y]our future with this company is limited." Foster stood up to leave but Riggin, who is much smaller than Foster, blocked the door. Riggin told Foster that he couldn't leave until she was finished with him. Foster said he was leaving and that he was taking his break. Riggin responded that Foster didn't deserve a break. Foster said he was going to file a labor charge and Riggin responded, "[Y]ou know a lot about that, don't you."

Riggin testified that when Foster told her that he needed to speak with her, she had no time to speak with him that day. Thus, Riggin would not sign a form indicating that they had a step one meeting. Riggin testified that she took Foster upstairs to her office to inform Foster that step one meetings should be scheduled in advance. Riggin denied making any threats to Foster and denied blocking the office door. Riggin also denied that Foster was on his break when this dispute took place. I

found Foster to be a forthright and credible witness. Riggin, on the other hand, seemed more intent on denying Foster's accusations than on testifying to the facts. Accordingly, I credit Foster's testimony over Riggin's denials.

Preliminary Conclusions

The discipline or discharge of employees for filing or processing grievances, whether pursuant to a formal contractual grievance procedure or informally in the absence of such a procedure, is generally held to be a violation of Section 8(a)(1). *John Sexton & Co.*, 217 NLRB 80 (1975); *Ernst Steel Corp.*, 212 NLRB 78 (1974); and *Southwestern Bell Telephone Co.*, 212 NLRB 43 (1974). Because grievance meetings are generally heated and emotional an employee's outburst will be protected unless the conduct is indefensible under the circumstances. *Postal Service v. NLRB*, 652 F.2d 409 (5th Cir. 1981); see also *Illinois Bell Telephone Co.*, 259 NLRB 1240 (1982). Here, I find no credible evidence that Foster engaged in insubordination or other indefensible conduct. While Riggin may have been busy when Foster approached her, Foster's request to discuss the grievance did not lose the protection of the Act.

I find Riggin's threat to Foster's employment status tends to restrain and coerce Foster in the performance of his duties as a shop steward and in his Section 7 right to process grievances. Accordingly, I find that Respondent through Riggin violated Section 8(a)(1) of the Act.

C. The Alleged Refusal to Furnish Information to UFCW Local 7

Facts

Keith Johnson was a meat cutter at Respondent's store 32 in Greely, Colorado. On February 18, 1997, Johnson received a warning for attendance problems. Again on February 25, Johnson received a suspension for attendance infractions. On March 3, a step-one grievance meeting was held pursuant to a grievance filed on Johnson's behalf. Union Representative Kevin Schneider represented Johnson and UFCW Local 7 at this meeting. At this meeting Johnson made a verbal request for information regarding the failure of Respondent to discipline other employees at the store. UFCW Local 7 only represented the meat department employees at store 32.

Schneider did not receive the information that he had requested. Johnson's grievances were taken to the second step of the grievance procedure. At the second-step meeting, Schneider was told that he could have access to the attendance records of meat department employees only. In fact, Schneider did receive access to the attendance records of the meat department bargaining unit employees that day. The issue in this case concerns the attendance records of grocery clerks and other nonbargaining unit employees.

On March 17, 1997, Schneider spoke with Stephanie Bouknight, Respondent's labor relations manager, and requested the attendance records of non-unit employees at store 32. Bouknight told Schneider that he could not have the records of employees that he did not represent. Schneider stated that since all employees at the store were covered by the same policies and attendance rules, he needed the records to see if there was disparate treatment between Johnson and other employees of the store. On April 21, 1997, Schneider wrote Bouknight reiterating that he was requesting the attendance records of store 32 employees to see if Johnson was receiving disparate treatment.

On June 9, 1997, Respondent issued Johnson a final warning for attendance infractions. Based on this discipline, Schneider filed another grievance on Johnson's behalf. To process this grievance, Schneider sent a letter to Bouknight requesting attendance records, timesheets, schedules, and discipline records related to attendance for seven-named employees and the entire night crew, and schedules and time sheets for three inclement weather dates. UFCW Local 7 did not represent the seven-named employees or any of the night crew employees. Schneider stated that the purpose of the request was to demonstrate that Johnson was treated differently from other employees at store 32. Respondent did not acknowledge this request.

In September 1997, Johnson was discharged. After Johnson's discharge, Schneider again wrote Bouknight requesting attendance records for the period of January 1 through July 14, 1997. Schneider explained that he had been informed that the employees whose records were requested had been observed clocking in late to work and were not disciplined. Schneider took the position that all store 32 employees were subject to the same time and attendance rules. Thus, Schneider argued that the information was relevant to the issue of disparate treatment. Bouknight did not respond to this request.

On June 23, 1998, Schneider again requested the same records from Bouknight. In this request Schneider stated that he needed the information to determine whether to take Johnson's grievances to arbitration. Bouknight replied that Respondent would not release the records of nonbargaining unit employees. Bouknight stated that Schneider could have the records for inclement weather dates but only for bargaining unit employees.

In February 1999, Johnson's grievance was submitted to arbitration. The issue of Local 7's request for the time and attendance records of nonunit employees was submitted to the arbitrator. The arbitrator did not rule on production of the requested information**.** At the time of the instant hearing, the arbitrator had not yet issued his decision.

Preliminary Conclusions

It is well settled that an employer has a statutory duty to provide a union, on request, with relevant information the union needs for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); and *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In determining whether an employer is obligated to supply particular information the question is whether there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial*, supra at 437. As the Supreme Court has stated, the disclosure obligation is measured by a liberal "discovery-type standard," not a trial-type standard, of relevance. Id.

The existence of an arbitration procedure does not relieve an employer or union from its duty to furnish the other party with information necessary to determine whether to process a griev-

ance to arbitration. *Teamsters Local 921 (San Francisco Newspaper Agency)*, 309 NLRB 901 (1992); and *Jewish Federation Council,* 306 NLRB 507 (1992). The duty to furnish the information does not terminate when the grievance is taken to arbitration. Id. In *International Harvester Co.*, 241 NLRB 600 (1979), the Board held that a bargaining agreement which vested an arbitrator of a grievance with authority to order disclosure of information did not require deferral of the unfair labor practice charges. In *Teamsters Local 921,* supra, the Board found a violation by the union for an unlawful delay in furnishing relevant information although the union furnished the matter during the arbitration, in a timely matter, after being ordered to so by the arbitrator.

In the instant case, Respondent argues that UFCW Local 7 never established that the requested information was relevant to Johnson's grievance. Further, Respondent apparently contends that Schneider was required to inform Respondent of nonhearsay witnesses to justify production of records of nonunit employees.

The general standard for determining relevance is a liberal "discovery standard." *NLRB v. Acme Industrial Co.,* supra. However, when the requested information deals with matters outside the bargaining unit, the requesting party must establish the relevancy and necessity of the information requested. *Barnard Engineering Co*., 282 NLRB 617 (1987). The requesting party must show that there is a logical foundation and factual basis for the request. *Postal Service*, 310 NLRB 391 (1993).

In *Postal Service*, supra, cited by the General Counsel, the charging party union requested information in order to process grievances regarding the discipline of two employees for attendance problems. The information requested included timecards of two supervisors. The union stated that the information was needed to show that the employees were treated disparately. The basis for this claim was the alleged observation of the union representative requesting the information. The Board found that the respondent employer's refusal to furnish the timecards of the supervisors was a violation of Section 8(a)(5) and (1) of the Act. The two supervisors and the two employees were subject to the same time and attendance rules. The observations of the union representative were sufficient to establish a logical foundation and factual basis for the request.

In the instant case, the nonunit employees are subject to the same time and attendance rules as Johnson. The information requested by Schneider and UFCW Local 7 could assist the Union in establishing disparate treatment of Johnson. The information could also have established that Johnson had no basis for claiming disparate treatment. In either event, the information would have been relevant to the Union's responsibility of deciding whether, or how, to process the grievances.

The hearsay nature of Schneider's justification for requesting this information does not change the result here. The requesting union would not normally have eye witness evidence of such happenings at the employer's premises. A union would have to rely on oral evidence which would normally not be as accurate as the respondent employer's records. Further, a union should not be required to prove the merits of a grievance before it is entitled to evidence which would tend to prove or disprove that grievance. Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act, by not furnishing UFCW Local 7 with relevant information concerning Johnson's grievances.

D. The Alleged Interrogation of Pam Peek

The Facts

As indicated above, employees represented by UFCW Local 7 engaged in a strike against Respondent in June 1996. After, the strike, employee Pam Peek, a service clerk at store 22, sent a letter to Don Gallegos, president of Respondent. In her letter, Peek complained that a courtesy clerk was performing work that should have been assigned to an all purpose clerk and that an all purpose clerk was sorting trash. Donna Riggin, manager of store 22, called Peek into her office and told Peek that she did not like Peek sending letters to Respondent's president. Riggin accused Peek of being sneaky. Peek said that she had informed Riggin of the letters so that she did not believe that she was being sneaky. Riggin questioned why Peek had not spoken to her first. Peek answered that she had discussed the assignment of clerks with Riggin on many occasions and without any result.

Preliminary Conclusions

Interrogation of employees is not unlawful per se. In determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984); and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Here, I find that the questioning of Peek did not tend to interfere with or restrain Peek in her union activities. First, there is no background of employer hostility and discrimination against union activities. Respondent has been party to a series of collective-bargaining agreements with the UFCW Local 7. The strike had ended. Thus, this first factor weighs against finding a violation. Second, the fact that Riggin was seeking to find out why Peek had bypassed her and gone to Respondent's president, is a factor weighing towards restraint. Third, the interrogation took place in Riggin's office. However, I find nothing coercive in that location. It seems reasonable to have such a conversation away from customers and other employees. Fourth, while Riggin expressed her dislike of Peek's writing to the Respondent's president, she made no threats. Fifth, Peek was covered by a grievance and arbitration procedure. Sixth, Peek felt free to honestly respond to Riggin's questions. Under these circumstances, I find that Riggin's conversation with Peek did not rise to the level of a violation of the Act.

E. The Restriction Imposed on the Bulletin Board

Facts

On November 21, 1998, Pam Peek, then a union steward at store 4, posted information concerning proposed legislation in Colorado. The proposed legislation was to make Colorado a "right to work state" and Peek was strongly opposed to that legislation. The information posted by Peek was removed by the store manager. Peek posted the information again and the material was again removed.

Store Manager Lynda Pickett told Peek that the employee could not post any right-to-work material at the store, even on the UFCW Local 7 bulletin board. Peek responded that she was not disturbing anybody and was only talking to employees who were on break and were willing to speak with her. Pickett insisted that information had to be approved by Respondent's director of human relations. Peek had never before been asked to clear material with the store manager or human relations department before posting materials on the union bulletin board.

Pickett testified that the union bulletin board is only for official union business. The collective-bargaining agreement states, "The Employer will provide bulletin board space for the posting of official Union notices." Pickett argued that handwritten notices and notices without a union seal are not official union notices. Pickett took the position that she could decide what could be placed on the UFCW Local 7's bulletin board. Peek credibly testified that the Local 7 bulletin board contained much material that was not official union business and did not have a union logo.

Preliminary Conclusions

The evidence reveals that Pickett removed posted information from the union bulletin board and told Peek that she could not post any right to work information in the store. Further, Pickett imposed a new rule that material on the UFCW Local 7 board had to be approved in advance.

Peek was engaged in protected, concerted activities in posting material of general interest to union members. It is well established that there is no statutory right of an employee or a union to use an employer's bulletin board. *Honeywell, Inc.,* 262 NLRB 1402 (1982); and *Container Corp. of America,* 244 NLRB 318 (1979). An employer has a right to restrict the use of company bulletin boards. However, that right may not be exercised discriminatorily so as to restrict postings of union materials. *J. C. Penny, Inc.*, 322 NLRB 238 (1996); and *Guardian Industries Corp.,* 313 NLRB 1275 (1995).

Respondent discriminatorily enforced its rules regarding the bulletin board. The board had been used for a variety of purposes including personal notices. Prior approval was not required until Peek posted materials regarding the "right to work" issue. Similarly, the requirement of union stationery or a union logo was not utilized before or after Peek's attempt to post materials opposed to the "right to work" legislation. See *Central Vermont Hospital*, 288 NLRB 514 (1988); and *Honeywell, Inc*., supra. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

F. The Restriction of Internal Union Election Campaigning

Facts

In August 1997, UFCW Local 7 was holding an election for union officers. Steve DiCroce, Respondent's director of human resources, testified that he spoke with Gary Hakes, then president of UFCW Local 7, about the locations where campaigning for the internal union election would be permissible. On August 27, DiCroce issued a memorandum setting forth that solicitation could take place outside the store or in the breakroom.

James Hobson, a business agent for Local 7, testified that he campaigned against the incumbent union president in August 1997. On August 2, 1997, Hobson visited Respondent's store 35. Hobson did not usually service this store. Hobson distributed internal union election materials to employees. During these activities, one store employee, notified Hobson about a dues question. Hobson asked for more information, handling the matter as he would if this was one of his assigned stores.

While Hobson was campaigning in the store, Eddie McClellan, a district investigator in Respondent's security department, approached him. Hobson testified that McClellan told the business agent not to talk to any employees on the sales floor and that Hobson could only talk to employees in the breakroom. Hobson argued that as a business agent for Local 7, he could talk to employees anywhere so long as he did not disrupt or interfere with work. Hobson said he would continue to talk with employees but would not disrupt work. McClellan then told Hobson to leave the store or he would call the police. Hobson did not leave the store but, instead, continued to walk through the store and campaign for the slate of union officers that he was backing. McClellan again approached Hobson, this time with the assistant store manager, Rudy Romero. Romero told Hobson that the business agent could speak with employees outside the store or in the breakroom. Romero said Hobson could distribute his election materials in the breakroom. Hobson said he would not disrupt the work of any employee but insisted that he would continue to speak with employees anywhere in the store. Romero informed Hobson that the police were on their way and asked Hobson to go upstairs. Hobson went to the break room and continued to speak with about the upcoming election. An employee mentioned a scheduling problem to Hobson and Hobson mentioned the problem to Romero.

When the police arrived, Hobson explained to the police that, as a business agent, he believed he had a right to be anywhere in the store. According to Hobson, he was calm but McClellan yelled at him. The police gave Hobson a citation for trespassing and required him to leave the store.

Preliminary Conclusions

The General Counsel, alleges that Respondent unilaterally changed the practice and procedure for union election campaigns. Clearly, Respondent and DiCroce did not act unilaterally. The undisputed testimony of DiCroce establishes that he had discussed the election campaign with the Union's president and reached agreement with the union president to limit campaigning so as to minimize disruption to the operation of the store. The right of access of union agents was a creature of the bargaining agreement and the parties clarified how that agreement would apply to the intraunion election.

Next, the General Counsel argues that the incumbent Union could not waive the statutory rights of its opposition slate in the intraunion election. I find no merit to this argument. An agreement to restrict campaigning to nonwork areas of a retail establish is not a waiver of any right. The parties recognizing the disruptive nature of an election, agreed on reasonable limits to such solicitations and distributions. However, those limits are equal to the usual protections of the Act. The limits are only applicable to extended contractual rights that the parties have agreed on. The parties to the collective-bargaining agreement may agree to modify the contract, especially, where as here, there are legitimate business reasons to do so. I find that

that Respondent and UFCW Local 7 did not unlawfully restrict the rights of employees or union agents to campaign against the incumbent union officers.

G. The Request of the Bakery Workers for Bargaining Notes

Facts

Bakery Workers Local # 26 represents Respondent's bakery employees at its bakery plant and at numerous stores. The latest collective-bargaining agreement between the parties is effective June 8, 1997, to June 9, 2001. In March 1998, the parties resolved a grievance concerning bargaining unit work performed by supervisors. Respondent admitted that the supervisors performed the work and proposed that employees be permitted to work extra hours to earn what they would have earned absent this breach of contract. The Bakery workers argued that the employees should be made whole by payment of the amounts not earned, without having to work any hours.

In support of its position, Respondent cited the remedy section of the collective-bargaining agreement which clearly states that in the case of a work dispute, the remedy will be to permit the employees to make up the time lost. There is no pay for time not worked in such cases.

In pursuant of a grievance regarding this dispute about the remedy, David Servold, a business representative, for Bakery Workers Local # 26, request the following information:

> Copies of bargaining notes taken by all of the company's members that were in the 1997 negotiations. To be more specific, I am requesting copies of notes regarding statements that were made from either side, over the "remedies for errors" proposal. I am not interested in any notes regarding the company's mental impression nor the company's strategy.

On June 23, 1998, Bouknight mailed Servold a copy of the collective-bargaining agreement but not Respondent's bargaining notes. The Bakery Workers made two further requests for the bargaining notes but Respondent did not provide its notes. Prior to the instant hearing, Bakery workers Local # 26 decided not to pursue the grievance.

Conclusions

It is well settled that an employer has a statutory duty to provide a union, on request, with relevant information the union needs for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In determining whether an employer is obligated to supply particular information the question is whether there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial*, supra at 437. As the Supreme Court has stated, the disclosure obligation is measured by a liberal "discovery-type standard," not a trial-type standard, of relevance. Id.

Here, the contract issue was so clear and unambiguous that the request for information appears to be of no use to the Union. Further, the issue became moot when the Union dropped the grievance. Accordingly, I find that Respondent did not violate Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. UFCW Local 7 and Bakery Workers Local # 26 are labor organizations within the meaning of Section 2(5) of the Act.

3. By threatening the job tenure of employee Willard Foster because of his activities on behalf of the UFCW Local 7, Respondent violated Section 8(a) (1) of the Act.

4. By refusing to furnish to UFCW Local 7 information relevant to the processing of a grievance, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By discriminatorily refusing to permit the posting of union information on the UFCW Local 7 bulletin board, Respondent violated Section 8(a)(1) of the Act.

6. The above-unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not otherwise violated Section 8(a)(5)(3) and (1) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, King Soopers, Inc., Lakewood, Greely, and Bellevue, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge or other reprisals in order to discourage union activities.

(b) Refusing to furnish information, relevant to grievance processing, to UFCW Local 7.

(c) Discriminatorily denying access to the UFCW Local 7 bulletin board to information of a general interest to union employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of a request, make available to the UFCW Local 7 the attendance records requested in June and September 1997 and June 1998, in connection with the grievances concerning employee Keith Johnson.

[2] All motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days after service by the Region, post at its Colorado facilities where violations have been found, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since June 1, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

[3] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of The United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with discharge or other reprisals in order to discourage union activities.

WE WILL NOT refuse to furnish information, relevant to grievance processing, to UFCW Local 7.

WE WILL NOT discriminatorily deny access to the UFCW Local 7 bulletin board to information of a general interest to union members.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days of a request, make available to the UFCW Local 7 the attendance records requested in June and September 1997 and June 1998, in connection with the grievances concerning employee Keith Johnson.

KING SOOPERS, INC.